IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 16-0745

Zirkelbach Construction, Inc.)
)
Plaintiff – Appellant,)
)
v.)
)
DOWL, LLC dba DOWL HKM,)
)
Defendant – Appellee.)

On Appeal from the District Court of the Thirteenth Judicial District
of the State of Montana in and for the County of Yellowstone
District Court Cause No. DV 14-1061

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

I. Did the District Court err in enforcing the limitation of liability clause in the parties' Contract for Professional Services, limiting the potential recovery of Appellant Zirkelbach Construction, Inc. (hereinafter "Zirkelbach") for the negligence of the Appellee DOWL, LLC d/b/a DOWL HKM (hereinafter "DOWL") to an amount less than one-tenth of DOWL's fees, and less than one twentieth of Zirkelbach's alleged out-of-pocket economic damages.

II. Was DOWL's contract, as modified by the two Addenda providing for Professional Liability Insurance, ambiguous as to the effect of the limitation of liability clause?

STATEMENT OF THE CASE

This action has its roots in a construction project to build a FedEx Ground facility at 3815 Hesper Road, Billings, Montana (hereinafter the "Project"). The Project's original owner, SunCap Billings, LLC, hired Zirkelbach to serve as General Contractor, as Zirkelbach had built numerous similar facilities nationwide. In early 2013, Zirkelbach approached DOWL to provide professional design and engineering services related to the Project. The parties' memorialized their agreement by signing a "Standard Agreement for Professional Services" (the "Agreement") authored by DOWL. The Agreement was later amended by two Addenda and several amendments, signed by the parties, which changed some of

the terms of the original Agreement and added substantially to the scope of work and contract price.

In the original Agreement, there was a provision which read:

> **Consequential Damages/Limitation of Liability.** To the fullest extent permitted by law, Dowl HKM and Client waive against each other, and the other's employees, officers, directors, agents, insurers, partners and consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project, and agree that Dowl HKM's total liability to Client under this Agreement shall be limited to $50,000.00.

Zirkelbach maintains that the $50,000.00 limit on liability is effectively an illegal exculpatory clause. Here, the contractual fee to DOWL, after the amendments to the Agreement totaled over $600,000.00.[1] Moreover, Zirkelbach expended well over $1,000,000.00 fixing the errors attributable to DOWL's failure to perform in a professional manner. In this context, the limitation of liability is so nominal as to basically function as an exculpatory clause. DOWL, a company engaged in a state-regulated profession, has no incentive to perform professionally. This Court should therefore find that the limitation of liability to a nominal amount acts as an exculpatory clause and violates both statute and public policy.

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[1] Some of the fees were originally paid by SunCap Billings, LLC, but were deductions from the contract between Zirkelbach and SunCap, LLC

Further, this Court should find that the Addenda to the Agreement make the Agreement as a whole ambiguous, and find that the inclusion of language affecting the limitation of liability clause, and including $1,000,000.00 of professional liability insurance indicates that the parties did not agree to limit DOWL's liability to $50,000.00.

STATEMENT OF THE FACTS

This action has its origin in the construction of the FedEx Ground facility located at 3815 Hesper Road in Billings, Montana. SunCap Billings, LLC ("SunCap") is the owner of the real property upon which the project was constructed. Zirkelbach was hired by SunCap as its general contractor for the construction of the FedEx facility. As part of its construction efforts, Zirkelbach and DOWL entered into an Agreement, supplemented by two Addenda and several amendments, under which DOWL was to provide the services of "Design Professionals" to complete the "final design of the site civil and Hesper Road right-of-way improvements . . . on-site and off-site construction administration and material testing." Amongst the activities that DOWL explicitly undertook was the final design and materials testing for both the construction site and the Hesper road improvements. See, Stipulation between Zirkelbach and DOWL which includes a copy of the parties' entire agreement (39 pages), App. 3, pp. 17 – 57. As a result of DOWL's negligence in its final design work, Zirkelbach incurred

substantial expense to fix DOWL's mistakes. These errors and remedial measures included:

- DOWL's failure to follow FedEx specifications for the dolly pad parking, which clearly indicated "Dolly parking pads shall have a maximum slope of 0.5%." See, *Zirkelbach Affidavit (9/12/16), Ex. B, Excerpt of Specifications for FedEx Ground Colocation, Station No.: 591, p. 1, 2.1.D* ¶*3*, App. 4, pp. 78-79. The DOWL plans specified a grade of over 1.5%, requiring Zirkelbach to correct this mistake at a cost of $319,993.12.
- FedEx specifications required certain roof drains to be drained into an underground storm water drainage and handling system. DOWL ignored the clear dictates of the plans and failed to design the underground system or tie-ins for the roof drains. See, *Zirkelbach Affidavit (9/12/16) Ex. C,* App. 4, p. 80. The cost to Zirkelbach to build the underground system and redesign the roof drainage was $246,812.63.
- FedEx plans required a certain specific number of truck parking spaces in the parking lot. DOWL's plans placed light poles in the middle of eight of the parking spaces, rather than in between spaces, requiring Zirkelbach to construct an additional eight spaces at a cost of $68,230.00.
- FedEx specifications required the sidewalks and curbs to have ADA compliant handicap access ramps. The DOWL plans failed to include these

ramps, which required Zirkelbach to expend $7425.00 to remedy the oversight.

- DOWL failed to conduct its pre-construction geotechnical investigation and report in a professional manner, failing to account for known fluctuations in the water table caused by the nearby Billings Bench Water District canal.
- In total, Zirkelbach spent $1,218,197.93 fixing problems caused directly by DOWL's negligent oversight in preparing site reports and final plans from the clear dictates of the FedEx build-to-suit specifications and plans.

Procedurally, this action began as a dispute between Zirkelbach and a third party, JTL Group, Inc, d/b/a Knife River over construction liens filed in relation to the project. On February 17, 2015, Zirkelbach filed a Second Amended Answer, Affirmative Defenses, Counterclaim and Third-Party Complaint that alleged counts of both negligence and breach of contract related to DOWL's performance of the work they undertook on the project.

DOWL filed a Motion for Partial Summary Judgment, seeking affirmation of the exculpatory clause in its Agreement, called the Standard Short Form Contract – MT, §5 – Under Section D – General Considerations, at § 5. which provides as follows:

> **Consequential Damages/Limitation of Liability.** To the fullest extent permitted by law, Dowl HKM and Client waive against each other, and the other's employees, officers, directors, agents, insurers, partners and consultants, any and all claims for or entitlement to special, incidental,

> indirect, or consequential damages arising out of, resulting from, or in any way related to the Project, and agree that Dowl HKM's total liability to Client under this Agreement shall be limited to $50,000.00.

See, *Stipulation between Zirkelbach Construction and DOWL, LLC*, App. 3, p. 21.

On November 16, 2016, the District Court rendered a decision on the motion, declaring that DOWL's maximum liability under the contract was $50,000.00. Zirkelbach moved for certification under Mont. R. Civ. P. 54(b). The District Court declared the judgment final under Rule 54(b) on December 7, 2016. This appeal ensued.

STANDARD OF REVIEW

Here, the Appellants appeal from a decision on a Motion for Partial Summary Judgment. In all summary judgment appeals, the standard of review is *de novo*. *Minnie v. City of Roundup*, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The Supreme Court will "review an order of summary judgment by utilizing the same criteria used by the District Court initially under Rule 56, M.R.Civ.P." *Id*. (citing *Kronen v. Richter*, 211 Mont. 208, 211, 683 P.2d 1315, 1317 (1984)). Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). *Ray v. Connell*, 2016 MT 95, ¶9, 383 Mont. 221, 225, 371 P.3d 391, 394.

Here, the District Court's finding that the limitation of liability was valid was a conclusion of law, applying its interpretation of Montana contract law to the parties' contract. The Supreme Court's "standard of review relating to conclusions of law is whether the trial judge's interpretation of the law is correct." *Carbon County v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680, 687 (1995)(citing *Steer v. Department of Revenue*, 245 Mont. 470, 474-75, 803 P.2d 601, 603 (1990)).

SUMMARY OF THE ARGUMENT

- Both Montana statutory and case law disfavor the limitation of liability clause found in the parties' contract as against public policy.

- The contract itself is ambiguous, as the clause in question does not clearly reflect a meeting of the minds on the issue of who will bear the burden of liability, or whether the parties meant to indemnify each other.

LEGAL ARGUMENT

A. Enforcement of DOWL's limitation of liability clause in this matter runs counter to Montana Statute and public policy.

Montana law generally disfavors clauses which exempt parties from liability, and precedent does not provide grounds to hold DOWL's limitation of liability to trivial amounts valid. Further, there is convincing public policy rational, fleshed out in other jurisdictions, which clearly vitiate against this Court's affirmation of DOWL's limitation of their liability to a nominal amount.

1. Montana statute and case law does not support DOWL's position that their limitation of liability clause is valid.

It is only through a strained and inaccurate reading of the Montana case law related to exculpatory clauses that DOWL finds any support for the position that it can limit its liability to a nominal amount. Here, the limit of liability would limit DOWL's liability to a small fraction of the contracted fee, and an even smaller portion of Zirkelbach's actual damages. When, as here, DOWL attempts to exempt itself from any level of responsibility, limited or not, from the repercussions of its own negligence, the provision in its contract limiting "DOWL HKM's total liability to Client under this Agreement . . . to $50,000" runs afoul of § 28-2-702, MCA providing that:

> All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of law.

The Montana Supreme Court has in fact determined that "no person or corporation may contract to exempt himself or itself from responsibility for his, its or its employee's: (1) fraud; (2) willful injury to the property or person of another; (3) negligent or willful violation of law." *Miller v. Fallon County*, 222 Mont. 214, 221, 721 P.2d 342, 346 (1986). Under an older statutory regime, but a still applicable standard, the Supreme Court noted that "[t]he general rule is that persons may not contract against the effect of their own negligence and that

agreements which attempt to do so are invalid." *Haynes v. County of Missoula*, 163 Mont. 270, 279, 517 P.2d 370, 376 (1973). Montana law disfavors agreements which attempt, on any level, to "contract against the effect of their own negligence," or to "exempt himself or itself from responsibility" for the negligent acts of the drafting party. *Id.*

Further, in interpreting *Miller v. Fallon County*'s holding on § 28-2-702, MCA the case notes that "Law consists of constitutions . . .; statutes and case law . . .; as well as common law . . ." *Id*. at 221. The *Miller* decision concludes that "an entity cannot contractually exculpate itself from liability for willful or negligent violation of legal duties, whether they be rooted in statutes or case law." *Id*. This common law, of course, includes negligence.

Montana cases that deal with limits on damages stemming from contract do not support the type of nominal limitation of liability clause at issue in this matter. Rather, all of the available Montana cases dealing with limitations of liability involved contracts that had provisions that limited only one distinct type of alleged damage. For example, in *Haines Pipeline Constr. V. Montana Power Co.*, 251 Mont. 422, 437, 830 P.2d 1230, 1240 (1991), the contract provision at issue and found valid provided only that "the Contractor shall make no claim for lost anticipated profits." The Court also found that the claim for lost profits was further preempted by the legitimate exercise of a contract termination clause,

creating a separate factual basis for denial of the claim. *Id*. at 437. This is not a comparable situation nor applicable precedent to justify DOWL's blanket attempt to limit their general liability to a nominal amount.

Similarly, *State ex. rel. Mountain States Tele. & Telegraph Co.*, 160 Mont. 443, 445, 503 P.2d 526, 528 (1972). deals with only lost profits, under a statutory regime that did not include Mont. Code Ann. § 28-2-702, and in a situation involving a state-supported and regulated monopoly rather than a contract between private parties. In that case, the plaintiff had sued for "'actual' damage to their business and . . . punitive damages" caused when Mountain States failed to publish their ad in the yellow pages. *State ex. rel. Mountain States Tele. & Telegraph Co.*, 160 Mont. 443, 445, 503 P.2d 526, 528 (1972). The Supreme Court, in reaching its decision affirming the validity of a provision limiting damages to "a refund not exceeding the amount of the charges for such of the subscriber's service as is affected during the period covered by the directory in which the error or omission occurs," and excluding lost profits noted that:

> "Even if decreased business or sales can be shown by a business whose listing has been omitted, the problem of causation when the offended subscriber is a business enterprise would be a problem for courts. Businesses suffer fluctuations from year to year, mostly unexplained, making the determination of damage a complex problem."

State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 160 Mont. at 446.

Further, the Court specifically noted the utility is:

> "[I]n a class of corporations strictly regulated in its rights and privileges and it therefore should be regulated, at least to the extent of its static known exposure to liabilities such as its directory omissions and errors when this function is required by the Commission, and at the very least indirectly involved in rate and service considerations."

Id. at 447.

In the instant case, where the claims against DOWL are for negligence that caused damages that are, quite literally, concrete in nature, there is no element of vagueness to the damage claims.[2] If proven, they will be quite easy to ascertain. Further, it is far from clear that the *Mountain States* case, involving a strictly regulated, state-supported monopoly, is still of any relevance after the passage of Mont. Code Ann. § 28-2-702 and the application of the *Tunkl* test (discussed below), accepted as part of Montana's case law in subsequent years.

In *Keeney Constr. v. James Talcott Constr. Co.*, 2002 MT 69, ¶ 22, 45 P.3d 19, 24, the dispute is not related to the validity of an exculpatory clause at all, but one of contract interpretation. 2002 MT 69, ¶ 22, 309 Mont. 226, 231, 45 P.3d 19, 24. In that case, the plaintiff Keeney sues for delay damages under a contract that allows the general contractor, Talcott, to direct Keeney's work. *Id*. at ¶ 9. After analyzing the contract, which contains no explicit or implied exculpatory clause

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[2] Undeniably the original contract and the addendums both limited consequential loss or damages. See, *Stipulation Between Zirkelbach Construction Inc. and DOWL, LLC,* App. 3, pp. 3, 16 and 19.

(as Keeney seems to allege), the Court makes its determination that no delay damages are available not based on a limitation of liability clause, the issue advanced by DOWL, but rather because the contract "simply authorizes Talcott to direct the timing for completion." *Id*. at ¶ 22. There is nothing in this case that supports DOWL's reading as somehow authorizing a blanket exculpatory clauses.

Finally, in *Five U's, Inc. v. Burger King Corp.*, 1998 MT 216, ¶¶ 21-23, 290 Mont. 452, 962 P.2d 1218, the Supreme Court did not affirm the validity of an exculpatory clause, but simply found that a provision providing for an abatement of rent when the property was unusable was proper. Again, with the question being whether one type of damages could be limited by contract, the Supreme Court held that "that the lease should be enforced as written, abating rental payments when use of the premises has been destroyed." *Id*. at ¶ 25.

None of these cases supports the contention that a partial, rather than complete, exculpatory clause is always valid. Rather, these cases are simple contract interpretation cases that coincidentally limit a category of allegedly recoverable damages through enforcement of normal and very specific contract provisions. None of the cases stands for the proposition that, in violation of the provisions of § 28-2-702, MCA a party can somehow contract away responsibility (even partial responsibility) for any behavior, including their negligent acts.

2. There are public policy rational that cut against enforcement of DOWL's limitation of liability clause.

Here, there are two distinct, but related, rational that illustrate why DOWL's limitation of liability to a nominal amount should be found to be against public policy. First, comparing the facts of this case to the so called *Tunkl* test, it is that the limitation of liability to a nominal amount, effectively creating an exculpatory clause, is against public policy. Second, liability serves to ensure diligent performance of professional services, and allowing parties to contract away all or all but trivial liability removes that incentive.

i. Under the test established in California under *Tunkl*, and adopted in Montana, DOWL's clause limiting its liability should be held contrary to public policy.

While generally parties have the freedom to agree to contract terms, there are circumstances where a contract or contract provision will be found void as being contrary to public policy. A long line of cases in multiple jurisdictions including Montana have taken a test now known as the *Tunkl* test and applied it to situations where a party attempts to contractually exculpate itself. Basically, this test upholds the general proposition that, in most cases, "[t]he general rule is that persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid." *Haynes*, 163 Mont. 270, 279.

In *Tunkl v. Regents of University of Cal*., 60 Cal. 2d 92, 94, 383 P.2d 441, 442, 32 Cal. Rptr. 33, 34 (Cal. 1963), the Supreme Court of California was confronted with a case where the plaintiff, Tunkl, brought an action for injuries

alleged to have resulted from the negligence of two UCLA physicians. Tunkl had, upon admission to the hospital, signed a document that contained a release for "The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees." *Id*. at 94. Under California Civil Code § 1668 (worded essentially identically to § 28-2-702, MCA), the California Court determined that "the exculpatory provision may stand only if it does not involve "the public interest." *Id*. at 96. The California Court went on to state that:

> "In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

Id. at 98-101.

Importantly, the Court stressed that "[t]o meet that test, the agreement need only fulfill some of the characteristics above outlined." *Id*. at 101. They stress that:

> "[T]he integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others. The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole."

Id. at 104.

In the context of hospital services, the Court makes clear that "prearranged exculpation from . . . negligence must partly rend the pattern and necessarily affect the public interest." *Id*. at 104.

Tunkl and the "*Tunkl* factors" have been widely adopted by other jurisdictions, creating a near universal rule for assessing whether a contract touches on a public interest. (See e.g., *Anchorage v. Locker*, 723 P.2d 1261, 1265 (Alaska 1986); *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977); *Wagenblast v. Odessa School District*, 110 Wash. 2d845, 851-52, 758 P.2d 968 (1988)). Montana too has adopted the "public interest" test laid out in *Tunkl*. (see *Haynes v. County of Missoula*, 163 Mont. 270, 283, 517 P.2d 370, 378 (1973)). In *Haynes*, the Montana Supreme Court looks at a release clause exempting the County of Missoula from liability for negligence, applies the *Tunkl* factors, and finds it to be

"contrary to public policy, against the public interest and therefore invalid and unenforceable." *Id*. at 284.

In the instant case, most, if not all of the *Tunkl* factors apply to the contract between DOWL and Zirkelbach. First, the contract clearly "concerns a business of a type generally thought suitable for public regulation." *Tunkl*, 60 Cal. 2d 92, 98. The contract between the parties clearly states that it is for "Professional Services" DOWL's contract further states that it will "perform its Services using that degree of care and skill ordinarily exercised under the same conditions by Design Professionals practicing in the same field at the same time in the same or similar locality." Used in this context "Design Professionals" has a specific, industry standard meaning, and is used as "A term used generally to refer to architects; civil, structural, mechanical, electrical, plumbing, and heating, ventilating, and air conditioning engineers; interior designers,; landscape architects; and others whose services have wither traditionally been considered 'professional' activities, require licensing or registration by the state, or otherwise require the knowledge and application of design principles appropriate to the problem at hand."[3] In Montana, the activities of engineers are strictly regulated (under § 37-67-301, MCA, et seq.), requiring state licensing. This makes sense when evaluating the obvious public

[3] See "http://www.colorado.edu/engineering/civil/Design-Build /DBS/ glossary.cgi?word=Design+Professional"

importance of having safe buildings designed and engineered by competent Design Professionals. The contract clearly involves DOWL's provision of services that the State has seen fit to closely regulate, thus satisfying the first and arguably most important *Tunkl* factor.

Examining the second *Tunkl* factor, "[t]he party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public." *Tunkl*, 60 Cal. 2d 92, 98-99. Here too, DOWL's provision of licensed, regulated professional services in the design of a safe building is clearly "a service of great importance to the public,' and a "matter of practical necessity for some members of the public." The construction of buildings is indeed "a service of great importance to the public," implicating numerous regulatory, public safety, and environmental concerns. The hiring of competent Design Professionals is, in fact, a "matter of practical necessity" for any person or business who wants to build a building that complies with law and policy, or for those who will in the future work in or visit the building.[4]

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[4] Zirkelbach was required to rebuild the dolly pads at a .5% grade for safety reasons, i.e. to keep dollies from rolling into people or property; also the ADA required ramps are a safety requirement. See, *Affidavit of Alan Zirkelbach,* App. 4, Ex. B p. 79.

The third factor in the *Tunkl* test is whether "[t]he party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards." *Tunkl*, 60 Cal. 2d 92, 99. DOWL obviously offers its professional services to anyone who needs them and is willing to pay, satisfying this factor.

While the parties to this transaction were reasonably sophisticated entities, the fact that the services of Design Professionals were a practical necessity to Zirkelbach, and that Zirkelbach was obligated by the project owner to utilize the services of DOWL satisfies the fourth *Tunkl* factor, providing that "[a]s a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services." *Tunkl*, 60 Cal. 2d 92, 99-100. Where, as here, the services of licensed Design Professionals were necessary in order to build the building at the heart of the contract, Zirkelbach maintains that DOWL enjoyed an advantage in bargaining strength. Further, the project's owner, SunCap Billings, LLC, had in its contract specifically directed Zirkelbach to utilize the services of DOWL, entirely foreclosing Zirkelbach's ability to seek a different firm for the services of Design Professionals. See, *Affidavit of Alan Zirkelbach* (9/12/16), App. 4, pp. 60.

Because Zirkelbach needed the services of DOWL, and had no choice in the matter, DOWL was able to present them with "a standardized adhesion contract of exculpation" with "no provision whereby a person may pay additional reasonable fees and obtain protection against negligence." *Tunkl*, 60 Cal. 2d 92, 100-101. Here, the contract was drafted by DOWL, contains a clause virtually eliminating liability for DOWL's own negligence, and contains no provision allowing for "protection against negligence" greater than the limit listed.

Finally, in this case, "as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." *Tunkl*, 60 Cal. 2d 92, 101. Zirkelbach was contracted by FedEx to construct a building, and in that role turned over the property of the project owner, SunCap, in the form of build-to-suit specifications and other work product, to DOWL. DOWL then, as a part of its contract and responsibility, took those specifications and work product and translated them into plans and designs usable in actual construction. The claims in this action arose because of DOWL's negligence in improperly translating FedEx's standard specifications and requirements to the actual building and site plans.

Importantly, from a policy standpoint, it is not necessary for there to be a complete exculpatory clause for a contract to become problematic. For example, when asked to differentiate between exculpatory and limit of liability clauses, the

Oregon Supreme Court noted in *Estey v. Mackenzie Eng'g*, 324 Ore. 372, 378, 927 P.2d 86, 89 (1996) that when "the specified contract damages at issue here are nominal in comparison with the damages that might foreseeably result from defendants' negligence, such distinction would be illusory." *Id.* at 89 (citing *Tessler & Son, Inc. v. Sonitrol Sec. Systems, Inc.*, 203 N.J. Super. 477, 482, 497 A.2d 530, 532 (1985)). Other courts have held that "[c]ourts considering the issue have consistently held that a limitation of liability will be found unenforceable if it establishes a limitation of liability that 'is so minimal compared to [a party's] expected compensation as to negate or drastically minimize [such party's] concern for the consequences of a breach of its contractual oblications.'" *Thrash Commer. Contrs., Inc. v. Terracon Consultants, Inc.*, 889 F. Supp. 2d 868, 875-876 (S.D. Miss. 2012)(citing *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995)).

This contract, and the provision attempting to limit DOWL's responsibility for its own negligence counts as a contract which touches on the public interest. Here, where the services of licensed Design Professionals are a necessary and desirable aspect of building a structure, it clear that public policy requires consequences when those professionals do not perform with due care. Limiting recovery to an arbitrary amount (in this case substantially less than the value of the contract to DOWL) irrespective of actual damages functions as a *de facto*

exculpatory clause contrary to public policy. (See, e.g. *Glassford v. BrickKicker*, 2011 VT 118, ¶ 16, 191 VT. 1, 35 A.3d 1044.

ii. Most jurisdictions hold that nominal damage limits are impermissible, as they eliminate the incentive to perform in a professional manner.

Another consistent line of judicial reasoning reinforces the fact that clauses which provide for nominal liability are against public policy by removing the incentive of the contracting party to perform in a professional manner. The vast majority of courts that have looked at limitations of liability which restrict liability to either a nominal amount when compared to the probable damages, or to less than the contracting party's fee provision, and found them to be unconscionable.

At a baseline, "[w]ith professional services, exculpation clauses are particularly disfavored." *Lucier v. Williams*, 366 N.J. Super. 485, 496, 841 A.2d 907, 914 (App. Div. 2004)(*citing Ehrlich v. First Nat'l Bank of Princeton*, 2008 N.J. Super. 264, 287, 505 A.2d 220 (Law Div.1984)). "The very nature of a professional service is one in which the person receiving the service relies upon the expertise, training, knowledge and stature of the profession," and "[e]xculpation provisions are antithetical to such a relationship." *Id*.

In *Thrash Commer. Contrs.*, 889 F. Supp. 2d 868, 872. Thrash had a general contract to renovate a building in Jackson, Mississippi. Thrash contracted with the other party, Terracon, to do soil testing and to determine the compliance

of fill materials. The contract between the parties contained a provision which provided that liability was limited "to the greater of $50,000 or its fee." *Id.* at 872. The court notes that "a limitation of liability will be found unenforceable if it establishes a limitation of liability that 'is so minimal compared to [a party's] expected compensation as to negate or drastically minimize [such party's] concern for the consequences of a breach of its contractual obligations.'" *Id*. at 875-76.

In *Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 202 (3d. Cir. Pa. 1995), the Pennsylvania court noted that Vlahal argues "exculpatory clauses, indemnity clauses and limitation of liability clauses differ only in form as the effect of each is to limit one's liability for one's own negligence," and agrees that "there are similarities between these types of clauses." 44 F.3d 195, 202 (3d. Cir. Pa. 1995). Recognizing these similarities, the court does affirm that these clauses can be valid, but notes that "[t]he inquiry must be whether the cap is so minimal compared to Sullivan's expected compensation as to negate or drastically minimize Sullivan's concern for the consequences of a breach of its contractual obligations." *Id*. at 204.

In *1800 Ocotillo, LLC v. WLB Group, Inc.*, the limit of liability provision at issue was limited "to the total fees actually paid by the Client to WLB for services rendered by WLB hereunder." 219 Ariz. 200, 202, 196 P.3d 222, 224, (2008). Finding that a limit of liability to WLB's fee was reasonable, the Arizona court

held that "WLB retains a substantial interest in exercising due care because it stands to lose the very thing that induced it to enter the contract in the first place." *Id*. at 203. The court found that "[b]ecause the clause does not eliminate WLB's liability, but instead caps it *by an amount that substantially preserves WLB's interest in exercising due care*, A.R.S. § 32-1159 [prohibiting indemnity agreements in contract and architect-engineer contracts] does not apply." (emph. added)

Many relevant cases have dealt with home inspections, where the fee and limitation of liability is negligible in comparison with the potential damage done by the inspector's negligence. In *Lucier v. Williams*, 366 N.J. Super. 485, 494, 841 A.2d 907, 913 (App.Div. 2004), the New Jersey court noted that "[i]f, upon the occasional dereliction, the home inspector's only consequence is the obligation to refund a few hundred dollars, . . . there is no meaningful incentive to act diligently in the performance of home inspection contracts." 366 N.J. Super. 485, 494, 841 A.2d 907, 913 (App.Div. 2004).

Almost universally, cases which have held that limitation of liability provisions valid have only dealt with provisions that include language that only limits liability to the maximum of some amount *OR* the tortfeasor's professional fee. In the absence of having any "skin in the game," there is no incentive for the professional to perform their duties in a professional manner.

In this case, where the limit on liability is only $50,000.00, and where the DOWL's fee itself was over $600,000.00, enforcement of what is, in this instance, a nominal limit on liability removes any incentive for the professional to perform their job in a professional manner. If this court finds that DOWL can limit their liability to a fraction of their professional fees, and an even smaller fraction of the actual damages, there is simply no incentive for them to perform in a professional manner.

B. Applying Montana law on contract interpretation demonstrates that the language of the parties' contract was ambiguous, both internally and as modified by the Addenda.

When the Contract, including its several addenda and amendments, is examined utilizing Montana's well-established canons of contract interpretation, the Standard Agreement for Professional Services between the two parties, and particularly the "Consequential Damages/Limitation of Liability" provision at issue, is ambiguous.

1. Montana's well established canons of contractual interpretation provide guidance as to when and how contracts can be ambiguous, and how courts should treat ambiguities and conflicts within a contract.

Montana has a large body of law dealing with the interpretation of contracts, and the various factors which contribute to the validity or invalidity, and the clarity or ambiguity of contracts. Further, Montana law has extensive case law that guides courts in their treatment of contractual disputes.

Under Montana law, "the construction and interpretation of a contract is a question of law." *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 19, 338 Mont. 41,164 P.3d 851 (citing *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192. "Whether an ambiguity exists in a contract is a question of law." *Id*. (citing *Mularoni v. Bing*, 2001 MT 215, ¶ 32, 306 Mont. 405, 34 P.3d 497. "If the language of a contract is ambiguous a factual determination must be made as to the parties' intent in entering into the contract." *Id*. (citing *In re Marriage of Mease,* 2004 MT 59, ¶ 30, 320 Mont. 229, 92 P.3d 1148; *Klawitter v. Dettmann,* 268 Mont. 275, 281, 886 P.2d 416, 420 (1994)).

This Court has held that "an ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings." *Id*. (citing *Ophus*, 2000 MT 251, ¶ 23; *Van Hook v. Jennings*, 1999 MT 198, ¶ 13, 295 Mont. 409, 983 P.2d 995. Importantly, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." *Id*. (see also § 28-3-301, MCA). Finally, and critically, "[a]n ambiguity in a contract is generally construed against the drafter." *Corporate Air v. Edwards Jet Ctr. Mont. Inc.*, 2008 MT 283, ¶ 32, 345 Mont. 336, 190 P.3d 1111 citing *Perf. Mach. Co., Inc. v. Yellowstone Mount. Club*, 2007 MT. 250, ¶ 39, 169 P.3d 394.

Under Montana law, "[t]he whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." § 28-3-202, MCA (see also *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 2015 MT 186, ¶ 21, 379 Mont. 513, 353 P.3d 483. Further, the Court will "construe the ambiguity and confusion engendered by the conflicting provisions most strongly against [the drafter]." *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 2015 MT 186, ¶ 23. The Court has held that "when the terms of a former contract are contradicted by the terms of a later contract relating to the same subject matter, the later contract controls." *Id*. When there is a later written contract, that contract "may alter or modify terms of a former contract if both parties agree to the new contract and it is supported by adequate consideration." *Birdham v. Morre*, 199 Mont. 161, 166, 648 P.2d 731, 734 (1982). "If the parties to a contract made a new and independent agreement concerning the same matter and the terms of the latter are so inconsistent with those of the former that they cannot stand together, the latter may be construed to discharge the former." *Id*. (citing *Kester v. Nelson*, 92 Mont. 69, 74, 10 P.2d 379, 380 (1932)).

2. The language of the original "Consequential Damages/Limitation of Liability" clause contained at Section 5 D. of the DOWL-drafted "Standard Agreement for Professional Services is subject to two reasonable but conflicting interpretations, and is therefore ambiguous.

In the Professional Services agreement between the parties, Section 5 D reads:

> D. Consequential Damages/Limitation of Liability
> To the fullest extent permitted by law, DOWL HKM and Client waive against each other, and the other's employees, officers, directors, agents, insurers, partners, and consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of,resulting from, or in any way related to the Project, and agree that DOWL HKM'S total liability to client under this Agreement shall be limited to $50,000.

See, *Stipulation Between Zirkelbach Construction Inc. and DOWL, LLC,* App. 3, p. 22.

Here, the very language of the provision provide grounds for two reasonable but conflicting interpretations, and is therefore ambiguous.

As noted above, "[w]hether an ambiguity exists in a contract is a question of law." *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 19. The Supreme Court has held that "an ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings." *Id.* When an ambiguity is found, "[a]n ambiguity in a contract is generally construed against the drafter." *Corporate Air v. Edwards Jet Ctr. Mont. Inc.*, 2008 MT 283, ¶ 32.

Within the disputed section itself, there is room for two reasonable but conflicting interpretations. The clause is unclear as to whether the limitation of liability applies to all liability, regardless of the source, or just to liability for consequential damages. The section's title does not separate or emphasize the

limitation of damages, or whether that applies to all damages. In most jurisdictions, where a clause purports to limit a party's damages for their own negligence, the clause at issue must identify negligence specifically. As stated in *VinnellCo. V. Pacific Elec Ry. Co.*, the California Supreme Court held that "where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide indemnity for the indemnitee's negligent acts." 52 Cal. 2d 411, 415, 340 P.2d 604, 607 (1959).

In the Agreement at issue, there is no clearly spelled out intent to limit liability from all sources, and certainly no specific reference to an indemnity for DOWL's negligence. Rather, the entire section covers waiver and liability generally, and only specifically mentions "special, incidental, indirect, or consequential damages."

The provision could therefore be construed to limit ALL liability, as asserted by DOWL, or, in the absence of sufficient specificity in the language of the clause, could be interpreted only to limit those types of damages specifically in the clause itself, as advanced by Zirkelbach. (see e.g. *Burnett v. Chimney Sweep*, 123 Cal. App. 4th 1057, 1067, 20 Cal. Rptr. 3d 562, 570 (Cal. App. 2d Dist. 2004) "[I]t 'cannot, without more explicit and specific words in this clause, conclude that the minds of the parties met and agreed to exempt [landlords] from the consequences of their own wrongful acts when of the kind and nature of those

here involved.'"). The clause does not explicitly mention negligence, the alleged cause of Zirkelbach's damages, and cannot represent a clear meeting of the minds to limit DOWL's liability for its negligent acts. This lack of clarity creates an ambiguity inherent in the disputed clause itself.

3. When taken as a whole, the documents other provisions and addenda indicate a conflict and ambiguity with DOWL's purported blanket limit of liability which must be construed against it.

Contracts, by necessity, must be examined as a whole, in an attempt to discern their intent, and to give meaning to each clause. (see Mont. Code Ann. § 28-3-202 "[t]he whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other."; see also *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 2015 MT 186, ¶ 21). A court's goal in interpreting a contract is to "give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (see Mont. Code Ann. § 28-3-301; see also *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 19). When this contract and all of its provisions and addenda are examined, it is unclear that the parties understood and agreed to the limit of liability.

The DOWL-drafted "Standard Agreement for Professional Services" contains the provision at issue, Section 5 D., which states:

> D. Consequential Damages/Limitation of Liability
> To the fullest extent permitted by law, DOWL HKM and Client waive

> against each other, and the other's employees, officers, directors, agents, insurers, partners, and consultants, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to the Project, and agree that DOWL HKM'S total liability to client under this Agreement shall be limited to $50,000.

See, *Stipulation Between Zirkelbach Construction Inc. and DOWL, LLC*, App. 3, p. 22.

Though Zirkelbach contends that the clause is, in fact, internally ambiguous, there are also ambiguities caused by conflicts with other clauses contained in both the Agreement and the two signed addenda.

First, DOWL's Agreement also contains, at Section 4 E., and insurance provision that states that:

> E. Insurance
> DOWL HKM will maintain insurance coverage for Professional, Comprehensive General, Automobile, Worker's Compensation and Employer's Liability in amounts in accordance with statutory requirements and DOWL's business requirements. Certificates evidencing such coverage will be provided to Client upon request.

Further, the Zirkelbach-drafted addenda, signed on March 5, 2013, and then again, with modification, on March 4 and May 22, 2013, contain the following provisions in clause B in both signed versions:

> B. The following provisions are added to the Contract:
>
> . . .
>
> 8. Notwithstanding anything herein to the contrary (except as set forth insection 9 below), neither Contractor nor Design Professional shall be liable to the other for any consequential losses or damages,

whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, including but not limited to losses of use, profits, business, reputation or financing.

9. Notwithstanding the preceding paragraph, Contractor shall be entitled to recover against Design Professional (i) any liquidated damages that Owner may assess against Contractor which are attributable to Design Professional, even though both parties recognize that such liquidated damages may include some damages that might otherwise be deemed to be consequential and (ii) consequential damages that may be imposed upon the Contractor by the Prime Contract between Owner and Contractor.

The addenda also have the following provisions that provide for the insurance under clause B. 3., which in the March 5, 2013 addendum reads, with handwritten comment:

3. Design Professional agrees to purchase and maintain insurance of the following types of coverage and limits of liability each of which shall name Contractor and the Owner as an additional insured: - *Except for Professional Liability Insurance.*

Type of Insurance	**Minimum limits of liability**
Professional Liability	$1,000,000 per occurance
Commercial General Liability	$1,000,000 per occurrence $200,000 aggregate
Workers' Compensation	$500,000
Automobile Coverage	$1,000,000 combined single limit
Automobile Coverage	$1,000, 000 hired and non-owned vehicles
Umbrella Liability	$1,000,000 total limit

See, *Stipulation Between Zirkelbach Construction Inc. and DOWL, LLC,* App. 3, p. 34

Clause B. 3. in the later May 22, 2013, March 4, 2013 addendum is identical, except for the inclusion of Professional Liability Insurance, and reads:

3. Design Professional agrees to purchase and maintain insurance of the following types of coverage and limits of liability each of which shall name Contractor and the Owner as an additional insured:

Type of Insurance	**Minimum limits of liability**
Professional Liability	$1,000,000 per occurance
Commercial General Liability	$1,000,000 per occurrence $200,000 aggregate
Workers' Compensation	$500,000
Automobile Coverage	$1,000,000 combined single limit
Automobile Coverage	$1,000, 000 hired and non-owned vehicles
Umbrella Liability	$1,000,000 total limit

See, *Stipulation Between Zirkelbach Construction Inc. and DOWL, LLC,* App. 3, p. 36

Both addenda contain an identical clause D, which notes that:

> Except as expressly modified, amended and /or supplemented by this Addendum, the Contract shall remain if [sic] full force and effect, and the parties hereby ratify and reaffirm all of the terms of the Contract. In the event of a conflict between the terms of the contract and this Addendum, the terms of this Addendum shall control.

Generally, "[t]he mutual intention of the parties, in turn, is to be ascertained from the writing if possible." (28-3-303, MCA; see also *Mary J. Baker Revocable Trust*, 2007 MT 159, ¶ 21). "There can be between the parties . . . no evidence of the agreement other than the contents of the writing except . . . when a mistake or imperfection of writing is put in issue by the pleadings." *Id*. Therefore, it is reasonable for this Court to further analyze the February 20, 2013 email from Jim Pastor of Zirkelbach to DOWL's Richard Selensky which says:

Rick,

> Per our conversation please resume with all phases of the work agreed upon in the previous LOI. Please note the amount of indemnification needs to be revised to reflect our final agreement.
> Thanks,
> Jim Pastor

See, *Stipulation Between Zirkelbach Construction Inc. and DOWL, LLC,* App. 3, p. 33

When all of the available evidence is examined and compared, as required by both statute and precedent, it becomes clear that Zirkelbach reasonably believed that it was contracting for a certain amount of indemnity from DOWL, in the amount of the Professional Liability contemplated in the final addenda. Further, the addenda, in clause D clearly and definitively modifies the original Agreement's section 5. D. by modifying the consequential damage provision. Further, the inclusion of $1,000,000.00 of professional liability coverage in the addenda clause B. 3., and the listing of the Contractor and Owner as additional insured conflicts with the DOWL-drafted agreement's alleged limit on *all* liability in section 5. D., particularly when combined with the DOWL-drafted agreement's insurance provision contained in section 4. E. All of these provisions, when taken together, create an ambiguity. In this situation, even if DOWL thought it was validly limiting its liability through the provisions of the agreement's section 5. D., the effect of the agreement's section 4. E., combined with the promises made in addendum clause B. 3. and the addenda provision giving it primacy over the original agreement in cases of conflict gave Zirkelbach the impression that

DOWL was providing for some indemnification in the form of Professional Liability insurance in the amount of $1,000,000.00, with Zirkelbach and the project owner as an additional insureds, and of which Zirkelbach or the project owner are the only logical beneficiaries.

With the various insurance and liability provisions existing in conflict, it is the court's place to attempt to "give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (see Mont. Code Ann. § 28-3-301; see also *Mary J. Baker Revocable Trust*, 2007 MT 159, ¶ 21). From the contents of the Agreement, the addenda, and the email from Zirkelbach's representative Jim Pastor, the parties reached an agreement, there was to be at least $1,000,000.00 in Professional Liability coverage which is in complete contradiction to a $50,000.00 limit on liability.

CONCLUSION

In this matter, both of the issues raised by the Appellant demonstrate that affirmation of DOWL's broad limit of liability to $50,000.00 should be found to be invalid. First, there is public policy rationale which disfavor clauses which act as *de facto* exculpatory clauses, limiting liability to a nominal amount when compared to either the professional fee of the party seeking the limitation, or the amount of damages. Here, where the $50,000.00 limit claimed by DOWL is around a tenth of the contract fee, and less than a twentieth of the actual damages

alleged by Zirkelbach, the limit of liability provides illusory motive to perform in a professional manner.

Second, an examination of the contract documents as a whole, along with the available parole evidence indicate that there was no "meeting of the minds" as to the effect of the alleged limit of liability clause. Here, the court should find that there are two different possible interpretations of the various clauses, and find that Zirkelbach's issuance of the addendum with a $1,000,000.00 Professional Liability insurance requirement indicates that the DOWL fully intended to provide for at least that level of indemnity for its potential negligence in preparing the engineering and design documents.

For the above-stated reasons, Zirkelbach requests judgment in its favor, finding both that the limitation of liability clause is invalid as against public policy, and that the contract contains inherent ambiguities which make the limitation of liability clause unenforceable.

DATED this 27th day of February, 2017.

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

/s/ W. Scott Green
W. Scott Green, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify this Motion is printed with a proportionally spaced Time New Roman text typeface of 14 points, is double spaced; and the word count is calculated by Microsoft Word 2003, is not more than 10,000 words, excluding the certificate of service and certificate of compliance.

/s/ W. Scott Green
W. Scott Green, Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following parties by the means designated below, this 27th day of February, 2017

[ ] U.S. Mail
[ ] Hand-Delivery
[ ] Facsimile
[ ] FedEx
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